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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 561

SWEENY INDEPENDENT SCHOOL DISTRICT, et al.,

Petitioners,

v.

MILDRED HARKLESS, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Opinion Below

Since the filing of the petition for a writ of certiorari, the opinion of the United States Court of Appeals for the Fifth Circuit and the dissenting opinion of Judge Jones have been reported at 427 F.2d 319, 324.

Questions Presented

1. Under 42 U.S.C. §1983 and the Fourteenth Amendment may equitable relief, including back pay for black teachers discriminatorily not rehired because of school desegregation, be awarded against a school district's board of trustees and superintendent sued only in their official capacities?

2. Assuming *arguendo* that school officials are liable to equitable remedies under 42 U.S.C. §1983 for racial discrimination, should certiorari be granted to decide whether the school district is also liable?

3. Assuming *arguendo* that school officials are liable to equitable remedies under 42 U.S.C. §1983 for racial discrimination, should certiorari be granted to decide whether the Fourteenth Amendment, together with 28 U.S.C. §1343(3) or 28 U.S.C. §1331, authorize this action independent of 42 U.S.C. §1983?

4. Should certiorari be granted on the issue of jury trial where:

(a) The Fifth Circuit, for the district court's guidance, reversed the grant of jury trial in an equitable action;

(b) pending motions in the district court may moot the jury trial issue;

(c) the jury trial issue is not clearly presented because the district court denied motions which, if reviewed here, would likely dispose of this case on the grounds that the arguable bases for jury trial no longer existed or the demand for jury trial was untimely?

Constitutional and Statutory Provisions Involved

This case involves the First, Seventh and Fourteenth Amendments to the United States Constitution. This case also involves the following statutes:

28 U.S.C. §1331.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in contro-

versy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any set off or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. §1343(3).

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

• • •

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

42 U.S.C. §1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statement

Respondents are ten black teachers who were not rehired for the 1966-67 school year by the Sweeny Independent School District. The instant action, charging racial discrimination, was filed May 23, 1966, seeking the equitable remedies of injunctive relief and back pay in the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. §1343(3), 42 U.S.C. §1983, and the Fourteenth Amendment (A. 1-14, 61-62, 83-84, 206-18).[1]

Respondent black teachers named as defendants the school district, the superintendent of schools, and the members of the district's board of trustees in both their individual and official capacities. But at the time of *voir dire* examination of the jury panel[2] on March 3, 1969, and because of the unwillingness of some members of the panel to assess a monetary award against the defendants individually (A. 224-40), respondents' counsel moved to dismiss the official defendants in their individual capacities (A. 232). The motion was granted leaving as defendants only the school district and the individual defendants in their official capacities (A. 237-39).

Subsequently, during trial, and in response to a suggestion by the district court that because of *Monroe* v. *Pape*, 365 U.S. 167 (1961) subject matter jurisdiction over the remaining defendants might be lacking, petitioners moved to dismiss on this ground (A. 244-49, 253-54). On March 13, 1969, the case was submitted to the jury on special

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[1] Citations are to the Appendix filed in the Fifth Circuit.

[2] Respondents consistently and repeatedly objected to the grant of jury trial in this case (*e.g.*, A. 71) or sought to remove any colorable basis for granting jury trial by dismissing a portion of the complaint (*e.g.*, A. 84-86, 89-95, 249-52). The district court, nonetheless, granted jury trial and denied leave to respondents for an interlocutory appeal (A. 80-83, 99-100, 114-116). The issues concerning jury trial are treated in greater detail, *infra* at pp. 11-12.

interrogatories and the jury rendered a verdict.[3] But the district court, on June 6, 1969, dismissed the second amended complaint without resolving any other issues on the grounds that *Monroe* v. *Pape, supra,* did not permit recovery against the school district and its officials sued in their official capacities.

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[3] The jury found that (A. 118-23):

Question Number 1: Do you find from a preponderance of the evidence that any plaintiff's race (Negro) was a factor in the failure of the Board of Trustees of The Sweeny Independent School District to offer re-employment for the school year 1966-67?

Answer: "No"

Question Number 2A: Do you find from a preponderance of the evidence the Board of Trustees of the District, on the occasion of its regular meeting of March 8, 1966, or at any time prior thereto, decided that the professional (teaching) staff of the system (District) would have to be reduced as a result of desegregation?

Answer: "Yes"

Question Number 2B: If, but only if, you have answered Question Number 2A "Yes", you will answer this question: Do you find from a preponderance of the evidence that when the Board determined at the March 8, 1966 meeting not to offer plaintiffs re-employment for the school year 1966-67, the qualifications of any plaintiff to teach in the District was not and had not been fairly and impartially evaluated and compared with the qualifications of all other teachers who taught in the system (District) during school year 1965-66, without consideration of the fact such plaintiff was a Negro?

Answer: "No"

Question Number 3A: It is undisputed in the record that after March 8, 1966 the Board of Trustees decided to recruit new teachers from outside the system (not employed by the District during 1965-66), to fill vacancies for the year 1966-67 created by the displacement of teaching staff resulting from desegregation. Bearing this in mind, do you find from a preponderance of the evidence that before filling any such va-

On appeal, the United States Court of Appeals for the Fifth Circuit, on June 2, 1970, reversed, 2-1, holding that a school district and its officials are liable to suit under 42 U.S.C. §1983 and that in an equitable action for injunctive relief and back pay, jury trial is not required.

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cancy, the Board failed to determine that any plaintiff was not qualified to fill any such vacancy?

Answer: "No"

Question Number 3B: With respect to any plaintiff whose name you have written in the space next above provided, do you find from a preponderance of the evidence that the Board failed to evaluate the qualifications of such plaintiff to fill such vacancy fairly and impartially?

Answer: No Answer

Question Number 4: Do you find from a preponderance of the evidence that the Superintendent Fred Miller and the Board of Trustees acted in good faith at all times and in every respect in the process of the Board's decision not to offer any plaintiff re-employment for the school year 1966-67?

Answer: "Yes"

Question Number 5: Do you find from a preponderance of the evidence that a factor relied upon by the Board in reaching its decision not to offer any plaintiff re-employment for the year 1966-67 after the filing of this law suit on May 23, 1966, was the fact that any such plaintiff was a party to this law suit?

Answer: "Yes"

If you have answered this Question Number 5 "Yes", then in the space next provided write the name of each plaintiff with respect to which you have so found; but, if you have answered the question "No", you will not write any name in such space.

Mildred Harkless, John P. Jones, Robert C. Woodard, Willie Dotson, Lillian F. Jammer, Benjamin F. Leviston and Velma L. Shelby

REASONS FOR DENYING THE WRIT

I.

Review by This Court Is Unnecessary Where It Is Now Well Settled That School Officials Are Subject to 42 U.S.C. §1983.

At least since *Brown* v. *Board of Education*, 347 U.S. 483 (1954) it has been clear that 42 U.S.C. §1983 grants a right of action for the racially discriminatory conduct of school officials. Petitioners' argument to the contrary is both frivolous and revolutionary (see Petition for a Writ of Certiorari at 10-11). Petitioners assert that *Monroe* v. *Pape*, 365 U.S. 167 (1961)—a case not involving equitable relief for official racial discrimination—somehow reduced the power of federal courts to curb racially discriminatory school boards. *Monroe* merely held that the city of Chicago was not liable in *damages*, in a respondeat superior context, for the torts of its police officers. We agree with the Court of Appeals that footnote 50 of the *Monroe* opinion, 365 U.S. at 191, means that earlier cases decided by this Court allowing equitable relief against municipalities do not permit the inference, after *Monroe*, that damage actions may be maintained against municipalities under the doctrine of respondeat superior. 427 F.2d at 322. Similarly, officials not personally involved in deprivation of civil rights are also not subject to § 1983. *Salazar* v. *Dowd*, 256 F. Supp. 220, 223 (D. Colo. 1966); *Sanberg* v. *Daley*, 306 F. Supp. 277 (N.D. Ill. 1969). The instant case is one, however, where respondeat superior is not at issue since the school board members named as defendants were the officials who actually refused to rehire respondent black teachers.

This Court has repeatedly exercised its power over state officials sued *only* in their official capacities under § 1983

or the Fourteenth Amendment.[4] *E.g., Ex Parte Young*, 209 U.S. 123, 159-60 (1908) (state attorney general);[5] *Baker* v. *Carr*, 369 U.S. 186 (1962) (state officials, including the secretary of state and the attorney general);[6] *Reynolds* v. v. *Sims*, 377 U.S. 533, 537 (1964) (state election officials); *WMCA* v. *Lorenzo*, 377 U.S. 633, 635 (1964) (state election officials); *Davis* v. *Mann*, 377 U.S. 678, 680 (1964) (state election officials); *Griffin* v. *County School Board*, 377 U.S. 218, 228 (1964) (county board of supervisors);[7] *Rinaldi* v.

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[4] Significantly in *Nixon* v. *Herndon*, 273 U.S. 536 (1927) Mr. Justice Holmes, writing for the Court, held that the Fourteenth Amendment forbids state court judges to bar blacks from voting in a Democratic primary election as required by state statute. The action was brought against the judges of elections for damages of $5000. 273 U.S. at 539. The amended petition, founded upon the predecessor of §1983 and other statutes (R. at 4-5), sought relief against the officials *only* as officials (R. at 3):

> The amended petition sought ". . . to redress an injury which he [plaintiff] sustained by reason of the acts of defendants *in their official capacities* discriminating against him by reason of his race and color, in violation of the constitution and laws of United States." (emphasis supplied)

In their motion to dismiss the defendant judges raised claims, *inter alia*, of failure to state a cause of action and the court's inability to grant relief (R. at 8); the motion to dismiss was sustained and the cause dismissed (R. at 9). This dismissal was, of course, reversed by this Court in *Nixon* v. *Herndon*, *supra*.

[5] The state attorney general was sued only in his official capacity as is made clear in the following papers contained in the *Young* record on file in this Court: Petitioner's Petition for Writs of Habeas Corpus and Certiorari and Motion for Leave to file, at 8, 15 (copy of original bill of complaint annexed to Petition); Petitioner's Brief on Hearing of Rule to Show Cause, at 6-8.

[6] Record, at 5, *Baker* v. *Carr*, 369 U.S. 186 (1962).

[7] The district court below misapprehended the importance of the *Griffin* holding by erroneously asserting *Griffin* was not a §1983 case. 300 F. Supp. at 805. But *Griffin* did in fact arise under the Act of April 20, 1871, now codified in part and 42 U.S.C. §1983. The *Griffin* litigation began in 1961 by the filing of an amended supplemental complaint in *Davis* v. *County School Board*, decided *sub nom. Brown* v. *Board of Education*, 347 U.S. 483 (1954). The

Yeager, 384 U.S. 305 (1966) (state prison officials and county treasurer).[8] Nor must it be forgotten that in *Monroe* itself, it was the *City of Chicago*, not any of its officials, which was held not subject to damages under § 1983.

In view of this list of precedents before and after *Monroe*, petitioners take two position: (1) this Court did not mention *Monroe* in those cases postdating 1961; and (2) several lower federal courts have held officials not subject to § 1983. (Petition for a Writ of Certiorari at 10-12.) The first position perpetuates a misunderstanding of what *Monroe* held. It is not necessary for this Court to mention *Monroe* in cases where it does not apply. Since *Monroe* involved a municipality sued for damages as respondeat superior, its holding does not affect claims for injunctive and monetary relief against officials sued in their official capacities for their own acts, as in *Rinaldi;* nor does *Monroe's* holding affect claims for equitable relief against officials sued in their official capacities to enjoin those officials from acting unconstitutionally as in *Baker* v. *Carr, Reynolds* v. *Sims, WMCA* v. *Lomenzo, Davis* v. *Mann,* and *Griffin.*

Petitioners' second position—*i.e.*, that 55 federal cases have concluded contrary to the Fifth Circuit, that § 1983 does not apply to officials—involves imprecision as to the holdings of those cases. Only one of the 55 cases is in point because it involved, as here, equitable relief from racial discrimination by officials not sued as respondeat superior.

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amended supplemental complaint—while adding new parties such as the county board of supervisors—did not disturb the original statutory basis of the action, i.e., §1983. *Davis* Record at 5, *Brown* v. *Board of Education*, 347 U.S. 483 (1954); Record at 20, *Griffin* v. *County School Board*, 377 U.S. 218 (1964).

[8] In *Rinaldi*, the officials specifically claimed by way of defense that the acts complained of were done in their official capacities. Record at 1, 13-16, *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966).

This case[9] was decided subsequent to the district court opinion below by the same district court judge whose decision in the instant case was reversed by the Fifth Circuit. The other 54 cases did not involve non-vicarious liability in equity for official racial discrimination. For this reason, petitioners have shown no conflict between the Fifth Circuit's opinion below and other federal courts. In short, the Fifth Circuit was plainly right in holding school officials liable for racial discrimination.

II.

Certiorari Should Be Denied Because the Issue Whether a School District Is Liable Under 42 U.S.C. §1983 Is Premature.

In view of the well-settled law, set out in Argument I, that school officials are liable under 42 U.S.C. § 1983 for racial discrimination, it is premature for this Court to reach the question whether a school district is also liable. This is so because equitable relief against the school officials would, as a practical matter, satisfy the claims of respondent black teachers and make academic the issue of school district liability. While it was proper for the Fifth Circuit to decide the question of school district liability for the guidance of the district court, this Court does not sit to render advisory opinions; therefore the issue of school district liability need not be faced here. *See, e.g., Daniel* v. *Paul,* 395 U.S. 298, 300 n. 1 (1969).[10]

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[9] *Bonner* v. *Texas City Independent School District,* 305 F. Supp. 600, 616 (S.D. Tex. 1969).

[10] For essentially similar reasons—and the added fact that the Fifth Circuit did not reach the question—it is also unnecessary for this Court to decide whether the Fourteenth Amendment together with 28 U.S.C. §1343(3) or 28 U.S.C. §1331 authorize this action independent of 42 U.S.C. §1983.

III.

Certiorari Should Be Denied Because the Issue Whether Jury Trial Was Properly Granted Is Premature and May Be Mooted.

For the guidance of the district court, which dismissed the complaint without reliance on the verdict, the Fifth Circuit below also held that jury trial had been erroneously granted. This issue, brought to this Court's attention by petitioners, is premature for these reasons: (a) since the Fifth Circuit predicated reversal upon the well-settled law discussed in Argument I, other grounds for the Fifth Circuit's action need not be faced here; (b) the jury trial issue may be mooted by subsequent district court proceedings; (c) the jury trial issue is not clearly presented on this record. The first of these reasons is self-evident and it also applies to other issues in this case discussed in Argument II, *supra*. The second of these reasons rests upon the fact that the special verdict set out *supra* at pp. 5-6, n. 3, is arguably construable for seven of the ten respondents or for the petitioners; consequently the district court can hardly enter judgment unclarified by its own findings. These findings may, in effect, render the verdict advisory and thus well within established equity practice. *See Hurwitz* v. *Hurwitz*, 136 F.2d 796 (D.C. Cir. 1943); *Aetna Ins. Co.* v. *Paddock*, 301 F.2d 807 (5th Cir. 1962); *Wolff* v. *Calla*, 288 F. Supp. 891 (E.D. Pa. 1968), *Schetter* v. *Housing Authority of City of Erie*, 132 F. Supp. 149 (W.D. Pa. 1955). Furthermore, in the district court, respondent black teachers have pending motions for judgment n.o.v. and for new trial. If either of these motions is granted, the jury trial question is moot on this record.

Finally, the jury trial question is inextricably connected to respondent black teachers' right to dismiss that portion

of their second amended complaint arguably giving the right to jury trial (A. 71, 84-86, 89-95, 249-52) as well as the arguably untimely demand for jury trial by petitioners.[11] It is likely, therefore, that the right to jury trial cannot be decided on this record because of these factors; in which case, the certiorari jurisdiction should not be exercised.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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[11] Petitioners waived their right to jury trial on the original complaint but demanded jury trial on the first amended complaint which did not change the relief sought but only added a due process of law theory to the equal protection of the laws claim in the original complaint (A. 61-63). Over respondents' objections, the district court permitted jury trial as to all issues merely because an additional theory had been added. 278 F. Supp. 637 (A. 95-100).